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POLICIES ON COMPETITION AND RESTRICTIVE BUSINESS PRACTICES IN THE PHILIPPINES

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INTRODUCTION

In the modern world, public authorities are expected to discharge two essential functions. The first is to make available to the people natural, economic and financial resources; the second is to formulate policies and enunciate rules by which the people may be enabled to engage in economic activities for the satisfaction of human wants. The policies formulated could result in the enunciation of rules as to substance, as well as rules as to form. The former relates to the manner by which the activities may be conducted, whereas the latter deals with the framework of the entity that may undertake the activities. In the Philippines, the rules as to the form are of three kinds, namely: those pertaining to sole proprietorships, those relating to partnerships, and those dealing with corporations.

Chapter I.

INSTITUTIONAL SETTING

The policies of the State on corporations can better be appreciated when seen in the light of the setting in which they have to operate. Relevant thereto are the political, economic, psychosocial and military dimensions operating within the country.

A. Aspects

For purposes of policy formulation in the fields of competition and restrictive business practices (RBPs), the political and economic dimensions are paramount. The assumption is that the operations of enterprises, including corporations, are affected by the political and economic ideologies obtaining within any given territory. Such ideologies are normally found in the constitution or, in the absence thereof, in statutes.

1. Political ideology

The political setting in the Philippines is one of political democracy. There is a representative Government which operates on the principle that sovereignty resides in the people and that all Government authority emanates from them.[1] Since the exercise of powers directly by the people is impractical, the Philippine people, through their Constitution,[2] delegate such powers to the Government. Thus, legislative, executive and judicial powers are conferred on three separate and distinct branches.[3]

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1 Article II, Section 1 of the 1989 Philippine Constitution provides as follows: "The Philippines is a democratic and republican State. Sovereignty resides in the people and all government authority emanates from them".

2 The Principle appears in the 1935, 1973 and 1989 Constitutions.

3 Articles VI, VII and VIII of the 1987 Constitution.

2. Economic ideology

The framework and powers of Government were conceived to operate under the economic principle of free enterprise.[4] The concept of liberty, both political and economic, is enshrined in the fundamental law.[5] The system of ownership of private property is likewise recognized.[6]

By virtue of this economic ideology, a person, whether natural or juridical, has the right to possess, use, or dispose of property as he sees fit, subject to normal limitations imposed by law.[7] Thus, he may devote his property to any profitable use or invest his money in any lucrative enterprise.

B. Regulatory environment

Public authority possesses regulatory powers which are exercised for purposes of intervention in economic activities.

1. Powers in relation to corporations

Because corporations are creations of law, they are subject to, or fall under the regime of, governmental powers, which may be categorized as inherent, constitutional and statutory.

(a) Inherent

Police power, taxation and eminent domain are attributes of government which are characterized as inherent and existing independently of constitutional grants.

The Government exercises its police power when it regulates businesses and occupations within its territorial jurisdiction, usually causing annoyance and financial loss to the corporation as a result of promoting the public good.

By the power of eminent domain, the State may take corporate property for public use upon payment of just compensation.

When the Government imposes upon the corporation some burden or charge for the use and support of government to enable the latter to discharge its functions, then the power of taxation is exercised.

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4 Article II, Section 20 of the 1987 Constitution provides: "The State recognizes the indispensable role of the private sector, encourages private enterprise, and provides incentives to needed investments." In addition, Article XII, Section 6, provides: "The use of property bears a social function, and all economic agents shall contribute to the common good. Individuals and private groups, including corporations, cooperatives, and similar collective organizations, shall have the right to own, establish, and operate economic enterprises, subject to the duty of the State to promote distributive justice and to intervene when the common good so demands."

5 Article III, Section 1 of the 1987 Constitution, provides: "No person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws."

6 Article III, Section 1 and Article XII, Section 6 of the 1987 Constitution.

7 Pertinent are the following provisions of the Civil Code: "Art.427. Ownership may be exercised over things or rights Art.428. The owner has the right to enjoy and dispose of a thing, without other limitations than those established by law. Art.431. The owner of a thing cannot make use thereof in such manner as to injure the rights of a third person."

(b) Constitutional

Under the 1987 Constitution, legislative power is vested in a Congress which consists of a Senate and a House of Representatives[8]; executive power rests in the President;[9] judicial power is vested in one Supreme Court and such lower courts as may be established by law.[10] The exercise of the foregoing powers can involve or affect corporations.

(c) Statutory

Legislation is affected by the Congress which can confer or delegate powers on agencies and instrumentalities under the executive branch of the Government. The powers thus conferred could involve regulation of any of the aspects of corporate operations.

Chapter II

BUSINESS ORGANIZATIONS

A. Forms

The forms of business organizations presently recognized in the Philippines are sole proprietorships, partnerships and corporations. Sole proprietorship is a business unit conducted for profit by an individual who owns all of the assets, personally owes all the liabilities, and enjoys all the profits, or suffers all the losses.[11] He may, of course, employ other individuals. A partnership is organized when two or more persons bind themselves to contribute money, property or industry to a common fund with the intention of dividing the profits among themselves.[12] It is established by express or implied contract for the common benefit or interest of all the partners.[13] Four types of this form exist, namely: general, limited, professional and industrial. They are governed by the provisions of the Civil Code of the Philippines.[14] A corporation can be established through the agreement of the parties concerned coupled with the approval of the State. It is defined under Philippine law as an artificial being created by operation of law, having rights of succession and the powers, attributes, and properties expressly authorized by law or incident to its existence.[15]

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8 Article VI of the 1987 Constitution.

9 Article VII, *supra*.

10 Article VIII, *supra*.

11 See Black's Law Dictionary, 5th Edition, p.1254.

12 Article 1767, Civil Code of the Philippines (1949).

13 Article 1771, Civil Code, provides that "a partnership may be constituted in any form ... ".

14 See Title IX, Republic Act No.386 (1949) and Gonzalo T. Santos, Jr., Legal Accounting, 1979, Rex Book Publishing, Manila, pp.19-26.

15 Section 2. Corporation Code of the Philippines (1980)

B. Legislation

1. In general

All business entities operating in the Philippines are governed by specific laws, the most basic of which is the organic law itself or the Constitution. Among the laws dealing with, or having significant effect on business are :

(a) The Price Control Law[16] as amended, which seeks to prevent monopoly, hoarding, injurious speculation, manipulation, and profiteering with respect to supply distribution and marketing of prime commodities whether imported or locally produced, and to fix prices, consistent with the policies of the State to increase production of commodities;

(b) The Public Service Act,[17] the purposes of which are: to secure adequate and sustained services for the public at the least possible cost, to prevent ruinous competition, to protect investments, and to secure the public against unreasonable charges and inefficient service;

(c) The Intellectual Property Law[18], which grants the author of literary or artistic production the exclusive privilege of multiplying, publishing and selling copies of the same;

(d) The Trademark Law,[19] as amended, which protects the owner of any trademark from the unlawful use thereof by unauthorized persons, firms or entities;

(e) The Patent Law,[20] as amended, which grants the patentee the exclusive right acquired over an invention to sell, make and sell the same, whether for commerce or industry;

(f) The Business Names Law,[21] which prohibits persons, firms or entities from using any registered business name except by the registrant himself or itself;

(g) The Usuary Law[22] which is designed to protect the public from usurious transactions; and,

(h) The Anti-Dummy Law[23] which prohibits foreigners from using the name or citizenship of Philippine nationals in order to pursue business ventures wholly or partly reserved by law for Philippine citizens.

As a rule, all forms of economic activities are subject to the so-called nationalization laws which prohibit or, to a certain degree, limit the participation of foreign nationals in specified lines of business enterprises. Among the more notable ones are the retail trade law,[24] the banking laws,[25] the mining laws,[26] and the transportation laws[27].

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16 Presidential Decree No.1674 (1980).

17 Commonwealth Act No.146, as amended (1946).

18 Presidential Decree No.49 (1972).

19 Republic Act No.166, as amended (1947).

20 Republic Act No.165, as amended (1947).

21 Act No.3883, as amended (1931).

22 Act No.2655, as amended (1916).

23 Commonwealth Act 108, (1936) as amended by Republic Act 134 (1947).

24 Republic Act No.1180 (1954).

25 See General Banking Act, Republic Act No.337 (1948), Rural Banks Act, Republic Act No.720 (1952), and Private Development Banks Act, Republic Act No.4093 (1964).

26 See Article XII of the 1987 Constitution.

27 Republic Act, No.1407 (1955).

2. For proprietorships and partnerships

Sole proprietorships and partnerships are generally governed by the Civil Code of the Philippines and by the special laws relating thereto.

3. For corporations

The rules dealing with, or relating to, corporations can be classified into two groups, namely: the Corporation Code and related statutes; and the Revised Securities Act and related laws.

(a) Corporation Code

Private corporations are governed by the Corporation Code of the Philippines, otherwise known as Batas Pambansa Bilang 68. This law evolved from the American system which started with the Philippine Bill of 1 July 1902. The Bill provided for the law-making power in the country to control the granting of franchises, privileges, and concessions.[28] In accordance therewith, the Philippine Commission, then the legislative body of the Philippines, enacted on 1 April 1906 the Corporation Law[29] which became the general law on incorporation. It provided for the formation and organization of corporations, and likewise defined their powers, fixed the duties of directors and officers, declared the rights and liabilities of stockholders and prescribed the conditions under which corporations could transact business. Amendments were subsequently adopted. The Corporation Law was replaced on 1 May 1980 by the Batas Pambansa Bilang 68, the law now in force.

(b) The Revised Securities Act

The sale, offering for sale or distribution of securities is governed by the Revised Securities Act. Otherwise known as Batas Pambansa Bilang 178, the Act became effective on 23 February 1982. It replaced the original Securities Act of 1936.[30]

The revised Act extends greater protection to investors than before. It expands the scope of the meaning[31] of the term "securities" to include not only traditional forms, such as stocks and bonds, but also commercial papers, pre-need plans and commodity futures contracts.[32] Moreover, it simplifies the registration process by eliminating the distinction between speculative and non-speculative securities.

A salient feature of the new law is the expansion of the disclosure requirements by providing for the submission of a meaningful set of data necessary for intelligent investment decision-making. The Act also imposes the duty of complying with reportorial requirements in cases of tender offers, proxy solicitations, and other related transactions, in order to protect the interest of the minority stockholders.

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28 Sections 74 and 75, Philippine Bill of 1902.

29 Act No.1459 (1906).

30 See Explanatory Note, Batas Pambansa Bilang 178.

31 Article 1767, Civil Code of the Philippines (1949).

32 Gonzalo T. Santos, Jr., "Corporate Management and Law in the Philippines", 1987, New Palayan Publishing House, Metro Manila, p.15.

Chapter III.

TRENDS IN INVESTMENT

A. Proprietorships

1. Number and sectors

Presently, there are 335,448 registered sole proprietorships[33] in the Philippines, the majority of them are engaged in retail trade, small-scale manufacturing such as woodcrafts, ironwork, shellcraft, and general services such as motor work, electronic and electrical trades, airconditioning and refrigeration services. These enterprises are generally financed with little capital.

B. Partnerships

There were 47,402 partnerships registered.[34] as of October 1990. Separate statistical data regarding the business sectors in which partnerships are engaged are not available as they are combined with the data on corporations.

C. Corporations

1. Number and sectors

There are 242,179 registered corporations[35] engaged in different lines of business activity ranging from agriculture, fishery and forestry; mining and quarrying; manufacturing; electricity, gas and water; construction; wholesale and retail trade; transportation, storage and communication; financing, insurance, real estate and business services, in addition to community, social and personal services. Many domestic corporations and partnerships have foreign investors participating in their capitalization.

The trends in investment for the 10-year period starting in 1980 can be seen in table 1.

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33 Statistical Data, Bureau of Trade Regulation and Consumer Protection, Department of Trade and Industry.

34 Securities and Echange Commission, *Monthly Paid-up Equity Investment Report for October 1990*, p.2.

35 Statistical Data from the Investments and Research Department, Securities and Exchange Commission.

Table 1

Number of registered domestic stock corporations and partnerships with foreign equity by major industry group: 1978 - 1989

Year	1978	1979	1980	1981	1982	1983	1984	1985	1986	1987	1988	1989
Total	590	573	584	526	481	507	444	529	567	826	1,121	1,555
Agriculture, fishery and forestry	32	27	29	27	24	33	24	32	52	64	71	67
Mining and quarrying	3	7	16	10	10	7	8	10	15	33	22	34
Manufacturing	227	181	184	135	129	144	119	126	138	236	353	468
Electricity and water	1	-	1	-	-	1	-	-	-	-	2	-
Construction	19	14	16	17	23	26	15	18	6	10	27	44
Wholesale and retail trade	192	189	201	188	173	162	154	195	214	265	351	471
Transportation, storage and communication	20	42	34	32	21	27	25	33	29	31	41	59
Financing, insurance real estate and business services	66	79	76	83	83	80	71	79	78	137	197	352
Communication, social and personal services	30	34	27	34	18	27	28	36	35	50	57	60

Source: Philippine Securities and Exchange Commission.

A comparison of the number of newly registered companies between 1980 and 1989 would show a trend that investments in the Philippines have risen to a great extent:

- From the rather low number of 29 companies registered in 1980, agriculture, fishery and forestry corporations had increased by as much as 231 per cent by the end of 1989.
- Registration of mining and quarrying grew by 212 per cent; from 16 registrants in 1980, 34 had been created by 1989. Manufacturing soared by 254 per cent, from a low of 184 firms registered in 1980 to 468 firms by the end of 1989.
- In the electricity, gas and water industry, there was a very low growth rate. One firm was registered in 1980, another one in 1983, then two in 1988.
- Construction boomed with the increase in realty development. In 1980, some 14 construction companies were registered. In 1989, new firms established amounted to 44, showing 275 per cent increase in registration.
- Wholesale and retail trade also gained during the same period. Compared with the 1980 level of 201, there were 471 corporations newly created in 1989, thus increasing registration under this industrial category by 234 per cent.
- In the transportation, storage and communications sector, 34 companies were registered in 1980 while the 1989 level showed 59 firms registered, or a 173 per cent increase.
- Financing, insurance, real estate and business services skyrocketed, growing by as much as 463 per cent for the same period, with the realty business contributing the most. While only 76 were created in 1980, in 1989, 352 were organized.

- Community, social and personal services likewise grew by 222 per cent. Only 22 were organized in 1980. The 1989 level shows that 60 were newly registered.

2. *Public and private*

Corporations established or organized under Philippine law are either public or private. According to the old Corporation Law a *private* corporation is one formed for some private purpose, benefit, aim or end, and organized mainly for profit.[36] The primary object may be said to be the promotion of private interest where the public has little concern except, perhaps, the indirect benefit resulting from the promotion of trade and development. A *public* corporation is one established by the government to manage a portion of the economic activities of the State. It exercises sovereign powers of government.

Of the 242,179 private corporations established as of 31 December 1990, only 412 are registered issuers. This figure excludes the 73 pre-need issuers. Of the registered issuers, 312 companies are in commercial/industrial sectors and the remainng 100 entities represent the mining/oil sectors. Again, of the 412 securities issuers, only 152 have their shares listed on stock exchanges. Unfortunately, only 110 are actively traded.

The number of publicly held corporations is insignificant when compared to the number of registered corporations. This may be attributed to a variety of reasons. First, some corporations are closely held family enterprises with little need to finance their activities beyond the financial capabilities of the families concerned. Moreover, they fear losing control over their enterprises. Secondly, there is a low demand for securities. A significant percentage of the population lives below the poverty level, and of those who earn enough to sustain their needs, only a small segment can save a portion of their income to invest in the stock market. Besides, some investors consider the stock market to be a gambling place. Thirdly, some corporations view the Government as not granting fiscal or non-fiscal incentives for them to go public. Fourthly, some would-be registrants consider the registration procedure under the Revised Securities Act as being too cumbersome, if not too revealing of their operations and organizational structure.

3. *Combinations*

(a) Kinds

The Corporation Code of the Philippines recognizes different modes of corporate reorganizations and combinations. The three common forms are holding companies, mergers and consolidations.

(i) Holding companies

A holding company is one that controls the capital stock of another corporation or of several other corporations which become its subsidiaries. The controlled corporations may be either a wholly owned or a majority-owned subsidiary of the holding company.

A subsidiary may be created by the holding company creating another corporation, or through the sale of all or substantially all of the assets of a corporation for the shares of another corporation, or through the gradual acquisition over a period of time of the shares of one corporation by another corporation.

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36 See Aguedo Agbayani, "Commentaries and Jurisprudence on the Commercial Law of the Philippines", Vol.3, 1980, Ed., Philippine Graphic Arts, Manila, p.52.

(ii) Mergers

A merger is a form of corporate combination whereby one corporation is absorbed by another corporation resulting in the loss of legal personality and dissolution of the absorbed corporation. The absorbing corporation survives and continues the combined business. This is effected through the exchange or sale of all or substantially all of the assets of one corporation for the shares of another corporation, which becomes the absorbing corporation.

(iii) Consolidations

In the case of consolidation, two existing corporations combine to form a third corporation. After the combination, the two original corporations are dissolved because they cease to have a *raison d'être* for their separate existence.

(b) Reasons for combination

The reason usually advanced for corporate combinations is development of a better marketing strategy, either to become more competitive in the market or to monopolize the trade or business, or to minimize competition. Combination is sometimes used as a strategy to take over the business or property of one or more companies. This is effected through the exchange of all assets of one corporation for shares of another corporation.

Reorganization may be resorted to as a means of business expansion or the pursuit of a much better capital condition. This happens when the capital of one company is "amalgamated" with another, thereby increasing total capital better to serve the public and/or finance projects requiring capital.

(c) Market position

With the combination, merger, consolidation or holding company, as a business strategy, the market position of the entities concerned is changed. They either become more competitive in the business sector in which they are engaged, monopolize the trade, or minimize competition among the companies engaged in the same line of business. Certain cases may be cited to illustrate the foregoing line of reasoning:

- Two companies with substantial Japanese interest merged in September 1989. This was done with a view to improving their market standing. Both companies were engaged in the electronics industry. The merged entity now has a better chance of improving its competitiveness in its industry sector where other companies with Japanese and Korean investments are likewise very active.

- The same holds true in the case of a corporation engaged in yarn which merged with four other textile firms and textile manufacturers in August 1990. The assets and properties of the companies were merged to improve their market standing in the oligopolistic textile business.

- A mining corporation merged with another mining company in October 1989, to expand their business activities.

- To raise their needed capital in the banking business, several savings banks merged during one calendar year.

4. *Classification*

Corporations are classified either as domestic or foreign. Domestic corporations are those firms registered under Philippine law while foreign corporations are firms which are established elsewhere.

Foreign corporations may further be sub-classified into resident or non-resident. Resident foreign corporations are corporations registered in a foreign country but doing business in the Philippines after securing the necessary license to engage in such activity. Non-resident foreign corporations are those that do not engage in business in the Philippines although they may hold or maintain regional headquarters in the country. Thus, although they may indirectly be engaged in certain business activities, such transactions are considered as merely isolated instances and the entities would not be considered as foreign corporations doing business in the Philippines.[37]

5. *Economic activities of foreign corporations*

Non-Philippine nationals[38] are allowed by law to engage in economic activity within the Philippines in two ways. They may invest through equity participation in any enterprise formed or existing under the laws of the Philippines, or they may do business in the country.

(a) Through investment in domestic enterprises

Under the provisions of the Omnibus Investment Code of 1987, domestic entities are categorized into registered enterprises[39] and non-registered enterprises. Registered enterprises are in turn classified into pioneer[40] and non-pioneer[41]. Under the same law, investments by non-Philippine nationals are categorized as "permitted" and "permissible".

(i) Permitted investments

Without the need of prior government authority, anyone not a Philippine national may invest in any registered enterprises to the extent that the total investment of non-Philippine nationals therein would not affect the entity's status as a registered enterprise.[42] This means that the total equity participation of non-Philippine nationals in a non-pioneer enterprise should not exceed 40 per cent, although the degree of ownership may reach 100 per cent in the case of a pioneer enterprise.

If the foreign investor, along with business partners in the Philippines, wishes to consider the company in which the investment is made as an affiliate, the word "Philippines" must be incorporated in its business name. This is for purposes of supervision and easier administration.

Likewise, anyone not a Philippine national, without need of prior authority, may invest in a non-registered enterprise to the extent that the total investment of non-Philippine nationals therein shall not exceed 40 per cent of the outstanding capital of the enterprise, unless existing law forbids any non-Philippine ownership in the enterprise or limits ownership by non-Philippine nationals to a percentage smaller than 40 per cent.[43]

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37 See Gonzalo Santos, Jr., "Some Selected Problems in Corporate Reorganizations and Quasi-Reorganizations", 1984, *Philippine Law Gazette*, Metro Manila, pp.3-6. See also Title XV of the Corporation Code (1980).

38 Republic Act, No.5455 (1968). See also the Omnibus Investments Code of 1987.

39 Article 11, Omnibus Investment Code of 1987.

40 See Article 17, *supra*.

41 See Article 18, *supra*.

42 See Article 46, *supra*.

43 See Article 47, *supra*.

(ii) Permissible investments

Under the Investment Code, if an investment by a non-Philippine national in a non-registered enterprise is such that the total participation by non-Philippine nationals in the outstanding capital exceeds 40 per cent, the enterprise must obtain prior authority from the Board of Investments. The authority requested shall be granted, unless the proposed investment:

(a) Would pose a clear and present danger of promoting monopolies or combinations in restraint of trade; or

(b) Would conflict with existing constitutional provisions and laws regulating the degree of required ownership by Philippine nationals in the enterprise; or

(c) Would be made in an enterprise engaged in an area adequately being exploited by Philippine nationals; or

(d) Would conflict or be inconsistent with the Investment Priorities Plan in force at the time the investment is sought to be made; or

(e) Would not contribute to the sound and balanced development of the national economy on a self-sustaining basis.

Investments made in the form of foreign exchange or other assets actually transferred to the Philippines shall also be registered with the Central Bank. The Board of Investments shall assess and appraise the value of such assets other than foreign exchange.

It is to be noted that an investment in excess of 40 per cent cannot be allowed if the foreign investor will use the same for promoting monopoly, or if the investment will result in a combination in restraint of trade.

(b) By doing business in the country

The second method by which non-Philippine nationals may engage in economic activities in the Philippines is by "doing business". This includes: soliciting orders, purchase or service contracts; opening offices, whether liaison offices or branches; appointing representatives or distributors who are domiciled in the Philippines or who in any calendar year stay in the Philippines for a period totalling 180 days or more; participating in the management, supervision or control of any domestic business, firm, entity, or corporation in the Philippines; or any other acts that imply a continuity of commercial dealings or arrangements, and contemplate to that extent the performance of acts or works, or the exercise of some of the functions normally incident to, and in progressive prosecution of, commercial gain for the purpose and object of the business organization.[44]

Under the Omnibus Investment Code, no alien, firm, association, partnership, corporation, or any other form of business organization formed, organized, chartered or existing under any laws other than those of the Philippines, or no one who is not a Philippine national, or where more than 40 per cent (50 per cent) of the outstanding capital is owned or controlled by aliens shall do business or engage in any economic activity in the Philippines or be registered, licensed, or permitted by the Securities and Exchange Commission or by any other bureau, office, agency, political subdivision or instrumentality of the Government to do business or engage in any economic activity in the Philippines without first securing a written certificate from the Board of Investments[45] to the effect that:

(a) The entry of the applicant therein will not pose a clear and present danger of promoting monopolies or combinations in restraint of trade;

(b) The operation or activity of such alien, firm, association, partnership, corporation or other form of business organization is not inconsistent with the Investment Priorities Plan;

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[44] See Article 44, *supra*.

[45] Article 48, *supra*.

(c) Such business or economic activity will contribute to the sound and balanced development of the national economy on a self-sustaining basis;

(d) Such business or economic activity by the applicant would not conflict with the Constitution or laws of the Philippines; and

(e) The field of business or economic activity is not one that is being adequately exploited by Philippine nationals.

It is evident that the license to engage in trade or business will not be issued if, as in the case of permissible investments, the entry of the applicant will pose a clear and present danger of promoting monopolies or combinations in restraint of trade.

The extent of penetration by foreign corporations into the economy may be gauged from data set out in three tables as follows: table 2 which shows the number of foreign corporations licensed by industry group; table 3 which gives this information by type of entity, and table 4 the number by nationality.

Table 2

Foreign corporations licensed to do business in the Philippines, by year and by major industry group - 1980-1990

	TOTAL PERIOD	1980	1981	1982	1983	1984	1985	1986	1987	1988	1989	1990
TOTAL NO. OF CORPORATIONS	388	45	24	43	36	21	16	17	32	40	47	67
AGRICULTURE, FISHERY & FORESTRY	3	3	-	-	-	-	-	-	-	-	-	-
MINING AND QUARRYING	23	2	2	6	-	2	-	-	2	5	3	1
MANUFACTURING	65	3	5	8	9	3	5	5	8	7	11	1
ELECTRICITY, GAS & WATER	2	1	1	-	-	-	-	-	-	-	-	-
CONSTRUCTION	20	1	2	3	1	1	1	-	-	2	4	5
WHOLESALE & RETAIL TRADE	32	2	-	7	-	1	-	2	2	6	6	6
TRANSPORTATION, STORAGE AND COMMUNICATION	8	1	-	2	-	1	-	-	-	1	1	1
FINANCE, INSURANCE & BUSINESS SERVICES	141	18	6	8	16	2	3	7	12	11	15	43
COMMODITITY SOCIAL AND PERSONAL SERVICES	19	2	-	2	4	3	2	-	-	1	3	2
NON STOCK	64	3	6	7	5	8	5	3	8	7	4	8
NO DATA	11	9	2	-	-	-	-	-	-	-	-	-

Source: Philippine Securities and Exchange Commission

Table 3

Foreign corporations licensed to do business in the Philippines, by year and by type of entity - 1980-1990

	TOTAL PERIOD	1980	1981	1982	1983	1984	1985	1986	1987	1988	1989	1990
TOTAL NO. OF CORPORATIONS	388	45	24	43	36	21	16	17	32	40	47	67
BRANCH OFFICES	278	35	20	34	27	17	6	12	22	29	33	43
REP. OFFICES	93	10	4	7	9	3	1	5	6	10	14	24
NOT SPECIFIED	17	-	-	2	-	1	9	-	4	1	-	-

Source : Philippine Securites and Exchange Commission

Table 4

Foreign corporations licensed to do business in the Philippines, by year and by nationality - 1980-1990

	TOTAL PERIOD	1980	1981	1982	1983	1984	1985	1986	1987	1988	1989	1990
TOTAL NO. OF CORPORATIONS	388	45	24	43	36	21	16	17	32	40	47	67
American	137	18	13	12	12	11	6	5	16	13	16	15
Australian	9	1	-	1	-	2	-	-	-	1	2	2
United Kingdom	20	7	1	-	-	-	-	4	2	1	-	5
Chinese	1	-	-	-	-	1	-	-	-	-	-	-
Hongkong	58	-	4	2	3	3	4	1	6	13	10	12
Japanese	55	7	-	3	9	3	1	2	4	4	6	16
Korean	11	2	-	-	2	-	-	2	-	1	2	2
Singaporean	16	-	-	1	4	-	-	1	1	2	4	3
Taiwanese	3	-	-	-	-	-	-	1	-	-	-	2
German	4	-	1	-	-	-	-	1	-	2	-	-
Other	42	8	-	12	1	-	-	-	2	3	7	9
No Data	32	2	5	12	5	1	5	-	1	-	-	1

Source: Philippine Securities and Exchange Commission

Table 5

Minimum Philippine ownership of enterprises in some business sectors

(Percentages)

	Business sector	Minimum Philippine ownership
1.	Banking institutions	70
	Private development banks	70
	Rural banks	100
	Savings and loan associations	70
	Pawnshops	70
2.	Public utilities	
	Authority to operate public utility	60
	Domestic air, commerce and/or air transportation	60
3.	Finance institutions	
	Investment houses	Majority of voting stocks
	Finance companies	60
4.	Government contracts	
	Public works, construction	75
	Supplier of Government corporations	60
	Supplier of Government agencies	75
5.	Natural resources	
	Private land transfer and conveyance	60
	Lease of alienable land of public domain	60
	Small-scale utilization of natural resources	60
	Lease of coral breeding lands	60
	Lands bordering shores	60
6.	Fishing and other aquatic rights	100
7.	Shipping	60 - 75
8.	Construction	60 - 75
9.	Retail trade	100
10.	Geothermal energy	60
11.	Others	
	Mass media	100
	Advertising	70
	Educational institutions	60
	Atomic energy facilities	60

6. Competition versus concentration of market power

The Philippine business environment is conducive to competition, although in some sectors there may be concentration in a few companies.

(a) Sectors and market structure

In all business sectors, the Philippine Government, through constitutional and statutory provisions, encourages competition for a healthier business climate. Thus, it discourages monopolies and oligopolies even if, in some instances, monopoly is unavoidable. This market condition is brought about by the failure of enterpreneurs to compete actively in fields that have in the past been monopolized by some businessmen or enterprises.

Brewing, for instance, was once monopolized by a well-established corporation until the organization of a second brewery in the early 1980s. Since then, business has been concentrated in these two giants, although the bulk of the market is still held by the first company. No other company so far has dared to compete in the field.

Another duopolistic sector is the soft drinks, soda pop or cola industry, which is concentrated in Coca-Cola Bottlers Phils., Inc. and Pepsico Phils. Inc. Although there is a third company, its market share is so small that this sector cannot be considered an oligopoly.

Water and electricity services, however, are supplied by government firms and may be considered to be monopolies. Domestic air transportation is monopolized by Philippine Airlines, which is a government-owned corporation.

Other sectors, such as realty development, land transportation, trading, manufacturing, banking, insurance, construction, livestock and fisheries are likewise oligopolistic. No particular company controls the market.

(b) Limitations by reason of citizenship

In almost all domestic enterprises, the rule is that Philippine ownership prevails. The reason may be found in the fact that, except for pioneer enterprises, the maximum allowable foreign investment in a domestic corporation is 40 per cent, unless expressly waived by the Board of Investments. More specifically, the nationalization laws prohibit or limit the ownership of shares of stocks in some business sectors, as can be seen from table 5, for example.

(c) Limitations on individual ownership

Aside from restrictions on foreign equity, other laws limit the percentage of ownership of persons or classes of persons in specified business activities. Notable is the General Banking Act,[46] which provides as follows:

(a) The total voting stocks which any corporation, including its wholly or majority-owned subsidiaries, may own in any bank shall not exceed 30 per cent of the voting stock of that bank;

(b) If the corporation is wholly owned, or the majority of the voting stocks thereof is owned by any one person or by persons related to each other within the third degree of consanguinity or affinity, the said corporation may not own more than 20 per cent of the voting stock of any bank;

(c) If two or more corporations are owned or controlled by the same group of persons, the aggregate voting stocks of those corporations in any bank shall not exceed 30 per cent of the voting stock of that bank;

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46 Republic Act No.337, as amended (1948).

(d) If those corporations are owned or controlled by one person or group of persons related to each other within the third degree of consanguinity or affinity, the aggregate voting stock which those corporations may own in any single bank shall not exceed 20 per cent of the voting stock of that bank; and

(e) A new commercial bank cannot be licensed to operate if the stockholdings of any person or persons related to each other within the third degree of consanguinity or affinity constitute more than 20 per cent of the voting stock of the new bank.

Chapter IV

INVESTMENT REGULATION

A. Policies and objectives

Aware that the country has an underdeveloped economy, the Government, as early as September 1966, adopted a policy of attracting domestic and foreign investment. Executive Order No. 21 was issued restating the adherence by the Government to constitutional rights and processes, particularly the freedom of investors from expropriation or requisition of their property, unless it is taken for public use and then only upon payment of just compensation.

To strengthen the Executive Order, the legislative body enacted the Republic Act, No. 5186, otherwise known as the Investment Incentives Act. On 27 February 1987, the Omnibus Investments Code was enacted to adapt to the changing investment climate. Article 2 thereof enunciates in explicit terms State policy with respect to investments, to wit:

"To accelerate the sound development of the national economy in consonance with the principles and objectives of economic nationalism and in pursuance of a planned economically feasible and practical dispersal of industries and the promotion of small and medium scale industries, under conditions which will encourage competition and discourage monopolies, the following are declared policies of the State:

"1. The State shall encourage private Philippine and foreign investments in industry, agriculture, forestry, mining, tourism and other sectors of the economy which shall provide significant employment opportunities relative to the amount of the capital being invested; increase productivity of the land, minerals, forestry, aquatic and other resources of the country, and improve utilization of the products thereof; improve technical skills of the people employed in the enterprise; provide a foundation for the future development of the economy; meet the test of international competitiveness; accelerate development of less developed regions of the country; and result in increased volume and value of exports for the economy.

"2. The State shall ensure holistic development by safeguarding the well-being of the social, cultural and ecological life of the people. For this purpose, consultation with affected communities will be conducted whenever necessary.

"3. The State shall extend to projects which will significantly contribute to the attainment of these objectives, fiscal incentives without which said projects may not be established in the locales, numbers and/or pace required for optimum national economic development. Fiscal incentive systems shall be devised to compensate for market imperfections, to reward performance contributing to economic development, be cost-efficient and be simple to administer.

"4. The State considers the private sector as the prime mover for economic growth. In this regard, private initiative is to be encouraged, with deregulation and self-regulation of business activities to be generally adopted where dictated by urgent social concerns.

"5. The State shall principally play a supportive role, rather than a competitive one, providing the framework, the climate and the incentives within which business activity is to take place.

"6. The State recognizes that there are appropriate roles for local and foreign capital to play in the development of the Philippine economy and that it is the responsibility of Government to define these roles and provide the climate for their entry and growth.

"7. The State recognizes that industrial peace is an essential element of economic growth and that it is a principal responsibility of the State to ensure that such a condition prevails.

"8. Fiscal incentives shall be extended to stimulate the establishment and assist initial operations of the enterprise, and shall terminate after a period of not more than 10 years from registration or start-up of operation unless a specific period is otherwise stated."

Evident from the foregoing statement of policies are the following significant points: acceleration of the development of the economy under conditions which will encourage competition and discourage monopolies; encouragement of investment so as to be able to meet tests of international competitiveness; adoption of fiscal incentive systems to compensate for market imperfections; encouragement of private initiative with deregulation and self-regulation of business activities to be generally adopted; and, the declaration that the State shall play a supportive rather than a competitive role in business.

B. Kinds of enterprises and investors

There are certain types of enterprises and investors granted special protection, guarantees and privileges under Philippine laws. These are registered, pioneer, non-pioneer and other investors.

A "registered enterprise"[47] is an individual, partnership, cooperative, corporation or other entity incorporated and/or organized and existing under Philippine law and registered with the Board of Investments. Excluded are banks, finance companies, stock and securities brokers, credit unions, and other business organizations whose principal purpose or source of income is to receive deposits, and/or borrow money, buy or sell, trade or invest in preferred stocks, bonds and other marketable instruments.

A "pioneer enterprise" [48] is a registered enterprise (i) engaged in manufacture, processing or production, and not merely in the assembly or packaging of goods, products, commodities, or raw materials that have not been or are not being produced in the Philippines on a commercial scale, or (ii) which uses a design, formula, scheme, method, process or system of production or transformation of any element, substance or raw materials into another raw material or finished goods which is new or untried in the Philippines, or (iii) engaged in the pursuit of agricultural, forestry and mining activities and/or services, including the industrial aspects of food processing whenever appropriate, pre-determined by the Board, in consultation with the appropriate Department, to be feasible and highly essential to the attainment of the national goal in relation to a declared specific national food and agricultural programme for self-sufficiency and other social benefits of the project, or (iv) which produces non-conventional fuels or manufactures equipment which utilize non-conventional sources of energy, or uses or converts to coal or other non-conventional fuels or sources of energy in its production, manufacturing or processing operations.

"Non-pioneer enterprises",[49] on the other hand, include all registered producer enterprises other than pioneer enterprises.

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47 Article 11, Omnibus Investments Code of 1987.

48 Article 17, *supra*.

49 Article 18, *supra*.

Investors are classified as either Philippine nationals or nationals of other countries.

"Philippine national"[50] refers to a citizen of the Philippines, or a domestic partnership or association wholly owned by citizens of the Philippines, or a corporation organized under the laws of the Philippines of which at least 60 per cent of the capital stock outstanding and entitled to vote is owned and held by citizens of the Philippines, or a trustee of funds for pension or other employee retirements or separation benefits, where the trustee is a Philippine national and at least 60 per cent of the fund will accrue to the benefit of Philippine nationals.

Foreign investors are investors other than Philippine nationals; "foreign investments"[51] mean equity investments owned by non-Philippine nationals in the form of foreign exchange or other assets actually transferred to the Philippines and registered with the Central Bank and the Board of Investments, which shall assess and approve the value of such assets other than foreign exchange.

C. Basic rights and guarantees

1. Constitutional

Fundamental basic rights and guarantees granted to investors or enterprises, whether foreign or domestic, are provided for under the Philippine Constitution. Most of them are found in the Bills of Rights.[52] Among the rights are:

(a) Due process clause

By the due process clause,[53] every person, whether natural or juridical, including a foreign investor or enterprise, is assured of the protection of his property, investment, or business, from the exercise of arbitrary governmental powers. Both substantive and procedural due process could be applied whenever appropriate. Thus, in the application of this clause, an enterprise or investor that violates any law on competition, or on restrictive business practices, would be entitled to due process and be protected from improper action by administrative and judicial functionaries.

(b) Equal protection clause

Under the equal protection clause,[54] a person, whether natural or juridical, falling within a class, is entitled to be treated in the same manner as any member of that class. By judicial pronouncement, so that a legislative classification may be upheld as valid, it is required that the same should be germane to the purpose of the law, and that among the objects of classification, there should be substantial distinctions.[55] It follows that this clause precludes discrimination against certain classes of aliens making investments in the Philippines. However, the rules on competition and other business practices applicable to investors in general would likewise be applicable to them regardless of nationality or kind of investment.

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50 Article 15, *supra*.

51 Article 14, *supra*.

52 Article III of the 1987 Constitution

53 Section 1, Article III, *supra*.

54 *Ibid*.

55 Louisville & N. RY. Co. v. Melton, 218 U.S. 36, 54 L.Ed.921, 30 S.Ct.676 (1910).

(c) Contracts clause

The constitutional prohibition against legislative enactment of a law impairing the obligation of contracts[56] works in favour of a private foreign investor or enterprise. This prohibition means that all contracts entered into by an investor or enterprise with any other party must be respected and the observance of the terms and conditions thereof assured. Unfortunately, restrictive business practices embodied in contracts could also be covered by the protection extended by this clause. Consequently, legislation is necessary to prohibit or restrict such practices in order to prevent them from finding their way into contracts.

(d) Expropriation clause

According to the expropriation clause[57], private property may be taken by the Government only for public use and only upon payment of just compensation. While "public use" is susceptible of varied construction and may even be interpreted to suit a particular government objective or mood, nevertheless, it must be understood that the "taking" should be for a recognized object of Government or one that will directly promote the welfare of the community in equal measure. Thus, the property of an enterprise or investor that has violated any law on competition or restrictive business practices may not be expropriated for that reason alone.

(e) Principles of international law

Relevant to the implementation of the rules on competition and restrictive business practices, as well as on the protection of private foreign investors or enterprises, is the provision expressly embodied in the organic law that the Philippines adopt the generally accepted principles of international law as part of the law of the land.[58] In accordance therewith, the customary and conventional rules laid down in international law will be applicable in the appropriate cases. Falling under this category is the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices.[59]

2. *Statutory*

Among the basic rights and guarantees granted by law to all investors and registered enterprises are the following:

(a) Repatriation of investments - by virtue of which foreign investors or enterprises are granted the right to repatriate the entire proceeds of the liquidation of the investments in the currency in which the investment was originally made and at the exchange rate prevailing at the time of repatriation.[60]

(b) Remittance of earnings - the right to remit earnings from the investments in the currency in which the investment was originally made and at the exchange rate prevailing at the time of remittance.[61] Foreign investors or enterprises shall have the right to remit sums received as compensation for expropriated property in the currency in which the investment was originally made and at the exchange rate prevailing at the time of remittance.

(c) Payment of foreign loans and obligations - under which the investor is granted the right to remit at the exchange rate prevailing at the time of remittance such sums as may be

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56 Section 10, Article III of the Philippine Constitution.

57 Section 9, Article III, *supra*.

58 Section 2, Article II, *supra*.

59 UNCTAD (TD/RBP/CONF/10/Rev.1).

60 Article 38 (a), Omnibus Investments Code of 1987.

61 Article 38 (b) *supra*.

necessary to meet the payment of interest and principal on foreign loans and foreign obligations arising from technological assistance contracts.[62]

(d) Freedom from expropriation - guaranteeing that foreign investors or enterprises shall have the right to remit sums received as compensation for expropriated property in the currency in which the investment was originally made and at the exchange rate at the time of remittance.[63]

(e) Requisition of investment - guarantees that there shall be no requisition of the property represented by the investment or of the property of enterprises, except in the event of war or national emergency; only for the duration thereof. Just compensation is to be determined and paid at the time of requisition or immediately after cessation of the state of war or national emergency; payments received as just compensation may be remitted in the currency in which the investment was originally made.[64]

D. Incentives

All registered enterprises are granted incentives to the extent that they are engaged in a preferred area of investment as may be determined by the Board of Investments, as follows:[65]

(1) Income tax holiday;
(2) Deduction of labour expense;
(3) Tax and duty exemption on imported capital equipment;
(4) Tax credit on domestic capital equipment;
(5) Exemption from contractor's tax;
(6) Simplification of Customs procedures;
(7) Unrestricted use of consigned equipment;
(8) Employment and residency of foreign nationals;
(9) Exemption on breeding stocks and genetic materials;
(10) Tax credit on domestic breeding stock and genetic materials;
(11) Tax credit for taxes and duties on raw materials;
(12) Access to Bonded Manufacturing/Trading Warehouse System;
(13) Exemption from taxes and duties on imported spare parts; and
(14) Exemption from wharfage dues and any export tax, duty impost and fee.

E. Investment measures

1. For registered enterprises

In connection with the statutory rights and guarantees extended to all registered enterprises and investors as well as the incentives granted to registered enterprises to the extent engaged in a preferred area of investment, certain qualifications are imposed by law.

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62 Article 38 (c) *supra*.
63 Article 38 (d) *supra*.
64 Article 38 (e) *supra*.
65 Article 39 *supra*.

(a) Export requirement

To be entitled to registration under the investment priorities plan,[66] an applicant must satisfy the Board of Investments that it complies with the citizenship requirement.[67] If it does not possess the required degree of ownership by Philippine nationals, it must be established that it proposes to engage in a pioneer project which, considering the nature and extent of capital requirements and other factors, cannot be adequately filled by Philippine nationals or if the applicant exports at least 70 per cent of its total production, the export requirement may be reduced under such conditions as the Board may determine.[68] It must likewise be shown that the applicant undertakes to attain the status of a Philippine national within 30 years from the date of registration. A registered enterprise that exports 100 per cent of its total production need not comply with this last requirement.[69]

The applicant may, on the other hand, propose to engage in a preferred project listed in the current investment priorities plan or, if not so listed, export at least 50 per cent of its total production, or if it is an existing producer, export part of production under such conditions as the Board may determine, or be an enterprise engaged or proposing to engage in the sale abroad of export products bought by it from one or more export producers, or be an enterprise engaged or proposing to engage in rendering technical, professional or other services or in exporting television and motion pictures and musical recordings made or produced in the Philippines, either directly or through a registered trader.[70]

(b) Requirement of use of domestic raw materials

The final product, in the case of a registered pioneer enterprise, must involve the substantial use and processing of domestic raw materials, whenever available, taking into account the risks and magnitude of investment.[71]

2. *For those doing business*

(a) Requirement of non-termination of franchise

It has been shown that one method by which non-Philippine nationals may engage in economic activities in the Philippines is by "doing business". Before so engaging, however, an applicant must secure a written certificate from the Board of Investments which could impose the condition, among others, that the applicant shall not terminate any franchise, license or other agreement that the applicant may have with a resident of the Philippines authorizing the latter to assemble, manufacture or sell within the Philippines the products of the applicant, except for violation thereof or other just cause and upon payment of compensation and reimbursement of investment and other expenses incurred by the licensee in developing a market for the said products.[72]

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66 See Article 32 *supra*.

67 Article 32, (1) *supra*.

68 Article 32, (1) (a) *supra*.

69 Article 32, (1) (b) *supra*.

70 Article 32, (2) *supra*.

71 Article 17 *supra*.

72 Article 49, (9) *supra*.

Chapter V.

STATE ENTERPRISES AND PRIVATIZATION

A. Modes of establishment

Ideally, in a market economy, all private corporations should be owned or controlled by the private sector. This goal, however, is not easily attainable. Many of the developing countries are unable to get their private sector to engage fully in trade or business. Thus, the Government itself undertakes certain ventures.

To accelerate economic activities, the State formulates policies and enunciates rules to provide natural, economic and financial resources to enable the people to engage in the production of goods and in the rendering of services for the fulfilment of needs and the satisfaction of wants. Creation of enterprises becomes a necessity to carry out this task. The State, in its eagerness to pursue this objective, organizes what is known as government-owned or -controlled corporations. These State enterprises are created or organized by special charter through legislative enactment in the interest of the common good and subject to the test of economic viability.[73]

In turn, these specially chartered government-owned corporations may establish subsidiaries by filing articles of incorporation with the appropriate government agency. Over a period of time, the number of State enterprises increases because of the desire of the executives of the parent companies to become officials or directors of the subsidiaries. In reality, therefore, while the Government discharges its functions in the regulation and supervision of business and financial enterprises, it also participates in the conduct of economic activities. Today, there is a proliferation of government-owned corporations actively engaged in various ventures. This is the situation in the case of the Philippines.

B. Sectors of government investment

In almost all major business interests and services, the State is directly or indirectly an active participant, not only in the exercise of its regulatory or supervisory powers but likewise as owner, co-owner, investor or manager thereof. It may be said, therefore, that the Government is an active competitor in many business activities.

In the field of drilling, refining and marketing of oil, the Philippine National Oil Company, a government-owned and controlled corporation, is actively competing with other private companies. The Philippine National Railway and the METRORAIL (land and water transportation), and the Philippine Airlines (domestic and international air transportation) are government-owned and controlled corporations engaged in business activities with the objective of providing transportation services to the commuting public.

As regards electricity and water services, the National Power Corporation and the National Waterworks and Sewerage Administration were created by special charter to provide the public with much needed services in these fields.

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73 See Gonzalo T. Santos, Jr. "Privatization in the Philippines", in *Privatization and Deregulation in Global Perspective*, Quorum Books, New York, 1990, p.312.

In finance, there are three major government-owned banks, namely, the Philippines National Bank, the Land Bank of the Philippines, and the Development Bank of the Philippines, all of which are actively competing in the banking business.

The Government Service Insurance System and the Social Security System, along with the Home Development Mutual Fund, were created principally to provide financial assistance to Government and private enterprise employees in the form of loans, as well as retirement, medical, and death benefits. They are government entities with investments in a number of business enterprises, more specifically in realty, construction and development projects. In fact, these establishments, as with other government-owned or controlled corporations, have created subsidiaries to act as their marketing or management arms, causing proliferation of government-owned and controlled corporations and creating an unhealthy business environment because the State competes in business activities instead of supervising and regulating them.

C. Privatization

1. Reasons for privatization

With the foregoing as a background, it becomes easier to comprehend the moves being taken by the Philippine Government to launch a privatization programme. On 8 December 1986, the President of the Philippines issued Proclamation No. 50, which was subsequently amended, directing the disposition of some government corporations and creating the so-called Committee on Privatization, consisting of Cabinet members, and a public trust known as the Asset Privatization Trust. The cornerstone of the programme[74] includes: (a) the judicious use of the corporate form in the creation of government entities for the production and distribution of economic goods and services, with the aim of giving primacy to the private sector so that the Government assumes only a supportive role; and (b) the reduction of government corporations which have proliferated to unmanageable proportions.

2. Manner of privatization

For the purpose of achieving the first declared policy of Proclamation No. 50, the Government Corporate Monitoring and Co-ordination Committee was revitalized. As to the second imperative, the Committee on Privatization was constituted and, in order to to centralize the privatization effort, the Asset Privatization Trust was organized.

The Asset Privatization Trust is a collegial body composed of a Chief Executive Trustee and Four Associate Executive Trustees. Its initial function is to take title to, and keep possession of, acquired assets. It is also authorized to conserve and prudently manage such acquired assets. The ultimate duty is, of course, to dispose of not only the acquired assets but also all of the government-owned or controlled corporations transferred to it by the Committee on Privatization.

Essentially, the Government must get the acquired assets, whether in the form of real or personal properties, or of shares of stocks held by the Development Bank of the Philippines, the Philippine National Bank and other government financial institutions which are the holders or depositaries of government-owned shares of stocks. As these acquired assets have to be kept somewhere, they are entrusted to the Asset Privatization Trust. To transfer them to the Trust, the government financial institution concerned initially draws up a list of all the disposable assets and the liabilities; from the list so constituted, the Committee chooses those which are to be sold to the private sector. The government financial institution itself executes the necessary deeds of assign-

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[74] *Ibid.*

ment, and the Secretary of Finance acts as attorney-in-fact.

In accordance with the presidential proclamation, the Committee on Privatization arranges for the transfer to, and eventual disposition by, the national Government of certain acquired, and therefore, non-performing assets of government financial institutions. It also arranges for the disposition of the assets which have been approved for divestment by the President.

The Committee on Privatization identifies the assets of government institutions which are deemed appropriate for privatization and divestment. This is done through an instrument describing the assets, or identifying the loan or other transaction giving rise to the receivables, obligations, and other property constituting the assets to be transferred to the Trust or to other institutions. The instrument thus executed is constituted as the operative act of transfer or referral of the assets described therein.

In the case of certain government corporations created under special law, the President is authorized to amend their corporate charters in order to terminate their corporate existence.

To secure the smooth flow of its operations as well as the continuity of the dispositions, the Trust as well as the corporations and assets held by it are declared by presidential proclamation to be free from all taxes, fees, charges, imposts and assessments arising from, or occasioned by, the passing of title over such corporations or assets from the government institutions to the Trust and/or from the Trust to a private acquirer or buyer. If the government institutions have acquired the assets by foreclosure, the non-payment of similar taxes, fees, charges, imposts, and assessments shall not be an impediment to the consolidation of title in the foreclosing institutions and the subsequent passing of title to the Trust or the corporations held by the Trust.

To add strength to the privatization process, the sale or transfer of the corporations may not be enjoined or hindered by reason of any lien arising out of taxes or other assessments in favour of the Government at the time of sale or transfer. The assumption is that the liens do not arise out of the transfer to, or sale from, the Trust. If, however, existing liens have already been attached, then the proceeds from the sale or transfer shall be subject to the tax lien the obligations secured by the said liens must first be satisfied.

All proceeds from the sale or other disposition of assets, net of fees, and commissions, become part of the general fund of the national Government. They are remitted to the national Treasury immediately upon receipt. However, the Trust is entitled to retain, upon approval by the Committee, such a portion of the proceeds as is necessary to maintain a revolving fund for the payment of fees, expenses and costs incurred by the Trust in the conservation and subsequent disposition of the assets held by it, including amounts required to service borrowings obtained by the Trust pursuant to lawful authority.

3. Track record

As of the end of 1990, the Asset Privatization Trust exceeded its goal in the disposition of non-performing assets.[75] The Trust had originally intended to sell assets of 9 billion pesos for the year, but exceeded the target by 41 per cent selling 14 billion pesos. This brought the total sold to over 20 billion pesos since the Trust was created in 1987.

During the period 399 assets were transferred, mostly by the Philippine National Bank and the Development Bank of the Philippines. The biggest among the assets was the 7 billion peso nickel refinery complex of Nonoc Mining and Industrial Corporation, followed by the 3.9 billion peso abandoned Philippine National Bank complex.

From the sale proceeds of 14 billion pesos for the year, 3.3 billion pesos were remitted to the Bureau of the Treasury. The discrepancy between the total sales and the remittances during the period was owing to the fact that some buyers paid on an installment basis or settled under the debt-to-asset swap scheme.

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[75] The Manila Chronicle, 9 January 1991, p.12.

Some of the assets intended to be sold in 1991 through the usual procedure of bidding and/or conversion of debt to equity are a paper manufacturing complex, the properties of a large transportation company, a mining corporation and three ocean-going vessels of the National Shipping Corporation.

Chapter VI

DEREGULATION AND FAIR TRADING

A. Constitutional requirements

The fundamental law of the Philippines prohibits monopolies and combinations in restraint of trade. Likewise, the law penalizes the cornering of markets and/or restraint on free competition.

The Constitution mandates that the State must protect Philippine enterprises against unfair foreign competition and trade practices.[76] The clause, however, is not to be interpreted as applying to everything harmful to Philippine enterprises. Rather, it refers only to foreign competition that is unfair. Although the State is likewise mandated to develop a self-reliant and independent national economy effectively controlled by Philippine nationals,[77] the intention is neither to coddle local inefficiency nor to protect local industries from foreign competition at the expense of the consuming public. Thus, the Constitution also declares that the State recognizes the indispensable role of the private sector, encourages private enterprise, and provides incentives to needed investments,[78] both local and foreign. In effect, the protection envisioned for Philippine enterprises extends only to "unfair" competition and "unfair" trade practices.

The Constitution also provides that the State shall regulate and exercise authority over foreign investments within its national jurisdiction and in accordance with national goals and priorities.[79] This provision does not mean absolute State control over foreign investments, as they are protected under the same Constitution and allied laws.

Also mandated is the prohibition against monopolies and combinations in restraint of trade or unfair competition. The Constitution thus provides that the "State shall regulate or prohibit monopolies when the public interest so requires. No combination in restraint of trade or unfair competition shall be allowed."[80] Consequently, monopolies and combinations in restraint of trade are not only liable to administrative sanctions but are likewise subject to penalty under the Revised Penal Code and related statutes.

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76 Section 1, Article XII of the 1987 Philippine Constitution.

77 Section 19, Article II, *supra*.

78 Section 20, *supra*.

79 Section 10, Article XII, *supra*.

80 Section 19, *supra*.

B. Statutory parameters

Existing legislation imposes criminal as well as civil sanctions on account of monopolies and restraints on free competition.

1. Penal sanctions

The basic statute which prohibits unfair trade practices, monopolies and combinations in restraint of trade is the law on Monopolies and Combinations under Act No. 3247, as amended, read along with the Revised Penal Code, as amended by Republic Act No.1956. The law deters any person, firm or entity from monopolizing or attempting to monopolize, or from taking part in any conspiracy or combination in the form of trust in restraint of trade or commerce or from restraining free competition in the markets.[81] The prohibition includes trust, pool, or other association of persons, natural or juridical, primarily designed for, among others, monopolizing or trafficking in a particular commodity, stifling or excluding competition or interferring with the normal course of business.[82]

In penalizing monopolies and combinations in restraint of trade, the theory is that competition and not combination should prevail While the law recognizes freedom of contract, such freedom may be properly checked where public policy indicates a contrary dominant interest.[83] It has thus been said that the need to protect public interest and welfare is a basis for curtailment of some private interest.[84] In effect, the objective of the law is to shield trade from unlawful restraint and monopolies in order to promote efficiency by effectively promoting desirable competition resulting in increased output, faster economic growth and lower prices of goods and services.

Article 186 of the Revised Penal Code thus provides:

" The penalty of prision correccional in its minimum period or a fine ranging from 200 to 6,000 pesos, or both, shall be imposed upon:

"1. Any person who shall enter into any contract or agreement or shall take part in any conspiracy or combination in the form of trust or otherwise, in restraint of trade or commerce or to prevent by artificial means free competition in the market;

"2. Any person who shall monopolize any merchandise or object of trade or commerce, or shall combine with any person or persons to monopolize said merchandise or object in order to alter the price thereof by spreading false rumors or making use of any other artifice to restrain free competition in the market;

"3. Any person who, being a manufacturer, producer, or processor of any merchandise or object of commerce or as importer of any merchandise or object of commerce, either as principal or agent, shall combine, conspire or agree in any manner with any person likewise engaged in the manufacture, production, processing, assembling or importation of such merchandise or object of commerce, or of increasing the market price in any part of the Philippines, of any such merchandise or object of commerce manufactured, produced, processed, assembled in or imported into the Philippines, or of any article in the manufacture of which such manufactured, produced, processed, or imported merchandise or object of commerce is used."

"If the offense mentioned in this article affects any food substance, motor fuel or lubricants, or other articles of prime necessity, the penalty shall be that of prision mayor in its minimum and medium periods, it being sufficient for the imposition thereof that the initial steps have been taken towards carrying out the purpose of the combination.

"Any property possessed under any contract or by any combination mentioned in the preceding paragraphs, and being the subject thereof, shall be forfeited to the Government of the Philippines.

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81 See Article 186, Revised Penal Code of the Philippines (1932).

82 U. S. v. Knight Co., 150 U.S. 1.

83 Miller, *Criminal Law*, 448 (1952).

84 Pernito Arrastre Services v. Mendosa, 146 SCRA 432 (1986).

"Whenever any of the offenses described above is committed by a corporation or association, the president and each one of the directors or managers of said corporation or association or its agent or representative in the Philippines in case of a foreign corporation or association, who shall have knowingly permitted or failed to prevent the commission of such offenses, shall be held liable as principal thereof."[85]

Complementary to the foregoing are the provisions of the Revised Penal Code on trademarks, tradenames and fraudulent designation of origin.

Article 188 provides as follows:

"The penalty of prision correccional in its minimum period or a fine ranging from 500 to 2,000 pesos, or both, shall be imposed upon:

"1. Any person who shall substitute the tradename or trademark of some other manufacturer or dealer or a colorable imitation thereof, for the tradename or trademark of the real manufacturer or dealer upon any article of commerce and shall sell the same;

"2. Any person who shall sell such articles of commerce or offer the same for sale, knowing that the tradename or trademark has been fraudulently used on such goods as described in the preceding subdivision;

"3. Any person who in the sale or advertising of his services shall use or substitute the service mark of some other person, or a colorable imitation of such mark; or

"4. Any person who knowing the purposes for which the tradename, trademark, or service mark of a person is to be used, prints, lithographs, or in any way reproduces such tradename, trademark, or service mark, or a colorable imitation thereof, for another person, to enable that other person to fraudulently use such tradename, trademark, or service mark on his own goods or in connection with the sale or advertising of his services.

"A tradename or trademark as herein used is a word or words, name, title, symbol, emblem, sign or device, or any combination thereof, used as an advertisement, sign, label, poster or otherwise, for the purpose of enabling the public to distinguish the business of the person who owns and uses said tradename or trademark.

"A service mark as herein used is a mark used in the sale or advertising of services to identify the services of one person and distinguish them from the services of others and includes without limitation the marks, names, symbols, titles, designations, slogan, character names, and distinctive features of radio or other advertising."[86]

Along the same vein are the provisions of Article 189, to wit:

"The penalty provided in the next preceding article shall be imposed upon:

"1. Any person who, in unfair competition and for the purpose of deceiving or defrauding another of his legitimate trade or the public in general, shall sell his goods giving them the general appearance of goods of another manufacturer or dealer, either as to the goods themselves, or in the wrapping of the packages in which they are contained, or the device or words thereon, or in any other feature of their appearance which would be likely to induce the public to believe that the goods offered are those of a manufacturer or dealer other than the actual manufacturer or dealer, or shall give other persons a chance or opportunity to do the same with a like purpose.

"2. Any person who shall affix, apply, annex, or use in connection with any goods or services or any container or containers for goods, a false designation of origin, or any false description of representation, and shall sell such goods or services.

"3. Any person who, by means of false or fraudulent representations or declarations, orally or in writing, or by other fraudulent means shall procure from the patent office or from any other office which may hereafter be established by law for the purpose, the registration of a tradename, trademark, or service mark, or of himself as the owner of such tradename, trademark, or service mark, or an entry respecting a tradename, trademark, or service marks".[87]

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85 Article 186, Revised Penal Code (1932), as amended by Republic Act No. 1956 (22 June 1957).

86 Article 188, Revised Penal Code (1932), as amended by Republic Act No. 1956 (22 June 1947).

2. *Civil sanctions*

Aggrieved parties can find solace under the Patent Law, the Trademark Law, the Law on Unfair Competition and the Law on Mislabeling and Fraudulent Advertising.

(a) The Patent Law

Under section 7 of the Patent Law, Republic Act No.165, any invention of a new and useful machine, manufactured product or substance, process, or an improvement of any of the foregoing, is patentable. The application for patent may be filed by the inventor, his heirs, legal representatives, or assigns.[88]

A patentee has the exclusive right to make, use, and sell the patented machine, article, or product, and to use the patented process for the purpose of industry or commerce throughout the territory of the Philippines for the term of the patent; and such making, using, or selling by any person without the authorization of the patentee constitutes infringement of the patent.[89]

Any patentee whose rights have been infringed may bring a civil action in the proper court to recover from the infringer damages sustained by reason of the infringement and to secure an injunction for the protection of his rights.[90] In case of repeated infringement by the infringer after final judgement of the court, the parties liable are subject to criminal penalties.

(b) The Trademark Law

Under Article 520 of the New Civil Code,[91] a trademark or tradename duly registered in the proper government bureau or office is owned by and pertains to the person, corporation, or firm registering the same.

Section 2 of the Trademark Law, Republic Act No. 166, provides that trademarks, tradenames, and service marks owned by persons, corporations, partnerships, or associations domiciled in the Philippines and by persons, corporations, partnerships, or associations domiciled in any foreign country may be registered, provided that said trademarks, tradenames, or service marks are in actual use in commerce and service not less than two months in the Philippines before the time the applications for registration are filed and provided that the country of which the applicant for registration is a citizen grants by law substantially similar privileges to citizens of the Philippines.[92]

Any person entitled to the exclusive use of a registered mark or tradename may recover damages in a civil action from any person who infringes his rights.[93] The plaintiff may also be granted an injunction.[94] Moreover, the court may order the destruction of all materials in the possession of the defendant or infringer bearing the registered mark or tradename or any reproduction or colorable imitation therefore.

In addition to civil remedies, the guilty party may be criminally prosecuted under the provisions of Article 188 of the Revised Penal Code[95] and subjected to a penalty consisting of imprisonment or fine.

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87 Article 189 of the Revised Penal Code (1932), as amended by Republic Act No. 1956 (22 June 1947).

88 Section 12 of the Republic Act No.165, as amended by Presidential Decree No.1263, 20 June 1947.

89 Sections 37 and 42, *supra*.

90 Section 42, *supra*.

91 Republic Act No.386 (1949).

92 Such a fact must be officially certified with a true copy of the foreign law translated into English by the Government of the foreign country and transmitted to the Government of the Philippines.

93 Section 23, *supra*.

94 *Ibid*.

95 Act No.3815 (1930).

(c) The Law on Unfair Competition

The Law on Unfair Competition[96] specifies that a person who has identified in the mind of the public the goods he manufactures or deals in, his business, or services from those of others, whether or not a mark or tradename is employed, has a proprietary right in the goodwill of the said goods, business or services so identified, which are protected in the same manner as other proprietary rights. Consequently, any person who employs deception or any other means contrary to good faith by which he passes off the goods manufactured by him or in which he deals, or his business, or services for those of the one having established the goodwill, or who commits any acts calculated to produce said result, shall be guilty of unfair competition,[97] and shall be liable for damages and be subject to injunction. Furthermore, he may be criminally prosecuted under the Revised Penal Code and punished by fine or imprisonment.

In particular, the following are deemed guilty of unfair competiton:

"(a) Any person, who in selling his goods shall give them the general appearance of goods of another manufacturer or dealer, either as to the goods themselves or in the wrapping of the packages in which they are contained, or the devices or words thereon, or in any other features of their appearance, which would be likely to influence purchasers to believe that the goods offered are those of a manufacturer or dealer, other than the actual manufacturer or dealer, or who otherwise clothes the goods with such appearance as shall deceive the public and defraud another of his legitimate trade, or any subsequent vendor of such goods or any agent of any vendor engaged in selling such goods with a like purpose;

"(b) Any person who by any artifice, or device, or who employs any other means calculated to induce the false belief that such person is offering the services of another who has identified such services in the mind of the public; or,

"(c) Any person who shall make any false statement in the course of trade or who shall commit any other act contrary to good faith of a nature calculated to discredit the goods business or services of another."

(d) The Law on Mislabeling and Fraudulent Advertising

Philippine law[98] makes it illegal for any person, firm or corporation, either as principal or as agent, to display, sell, barter, or exchange, or to cause to be sent, carried, or brought for display, sale, barter, or exchange from any foreign country into the Philippines, or from the Philippines into any foreign country, any article which is falsely packed, labeled, or marked, in such a way as to misrepresent the character, amount, value, contents, properties, or condition of the article or of the materials of which it is composed, or any article which is accompanied by advertising matter which misrepresents the character, amount, value, contents, properties, or condition of the article advertised or of the materials of which it is composed whether or not the article or the container thereof, is mislabeled, or misrepresented.

Under the law on fraudulent advertising, no person, firm or corporation, either as principal or as agent, may advertise in any newspaper, book, or periodical printed in the Philippines, or in any handbill, billboard, pamphlet, circular or other form of advertising, any article when its character, value, properties, or condition is misrepresented.

Moreover, the law prohibits any person, firm or corporation from misrepresenting the character or value of any stocks, bonds, or shares of any firm or corporation, or of the properties or prospectus of any firm or corporation.

Finally, it is unlawful for any person or corporation to use the mails of the Philippines for the circulation of any advertising matter which is not allowed by law.

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96 Chapter VI of the Republic Act No. 166, 1947.

97 See Section 29, *supra*.

98 Act No.3740 (1931).

C. Proposed legislation

At present there are three proposed bills pending in the lower house of the Congress. These bills seek to establish a more comprehensive law for the purpose of protecting trade and commerce against unlawful restraints and monopolies. Their authors envisage that the bills will fill the gaps which had not been perceived when the existing laws on monopolies and unfair competition were drafted.

The first proposal is House Bill No. 23560, entitled: "An Act Against Unlawful Restraints and Monopolies on Commerce". It seeks to expand the coverage of the anti-trust law to cover any line of trade or commerce, as well as any commodity, for use and/or consumption including entering into tying contracts. The Bill likewise seeks to create special bodies to exercise powers of regulation, namely, the Land Transportation Office, in cases of common carriers; the Central Bank, in banking; and the Bureau of Domestic Trade in all other types of commerce. It would likewise increase the fine for violation of the law.

The second is House Bill No. 26240, entitled: "An Act Creating a Special Body that Shall Regulate and Exercise Authority Over Monopolistic Practices, Combinations in Restraint of Trade or Unfair Competition and Appropriating Funds Therefor". This Bill proposes the creation of an agency to be known as the "Philippine Anti-trust Commission". It will enforce the provisions of the anti-trust laws. The Commission will be granted visitorial, investigative and coercive powers, in order to enforce effectively the anti-trust law. The proposed Act is likewise aimed at lengthening the period of incarceration and increasing the fines of those found guilty of a violation.

The third bill pending is House Bill No. 26308: "An Act Implementing Section 19, Article XII of the 1987 Constitution: Defining and Prohibiting Monopolies and Combinations in Restraint of Trade, Providing Penalties for Violations Thereof, and for Other Purposes". It features the creation of the Office of the Anti-trust Prosecutor which would be empowered to:

(1) Enforce and administer anti-trust laws;

(2) Investigate and prosecute violations thereof;

(3) Initiate and prosecute the appropriate civil action;

(4) Make a civil investigative demand;

(5) Compel a prospective civil defendant to produce documents;

(6) Require persons engaged in trade, commerce or industry to file reports;

(7) Investigate trade conditions;

(8) Investigate and make recommendation for the readjustment of business;

(9) Initiate and prosecute the proper action or proceeding to restore natural, unrestricted, or full competition;

(10) Initiate and prosecute the proper action or proceeding to dismantle any and all combinations of capital; and,

(11) Initiate criminal action and prosecute offenders.

Senate Bill No. 996, entitled: "An Act to Re-examine, Realign, and Recast into the Requirements of the Constitution the Laws Prohibiting Monopolies, Combinations in Restraint of Trade and Unfair Competition and for other Purposes" is pending approval in the Upper House. The bill is designed to restore competition where it has disappeared, preserve it where it still prevails, and perpetuate it as a system for controlling and regulating the economy of the Philippines. Like House Bill No. 26240, Senate Bill No. 996 contains a proposal to establish an independent anti-trust commission, as a special agency to oversee the enforcement of the Act once it has been made law. The proposed agency will be similar to, and has been greatly influenced by, the functional and structural organization of the Office of the Ombudsman, as provided for in Senate Bill No. 543 which was passed on third reading in the Senate in 1989. It is thus intended to avoid the discrepancies of Act No. 3247. In effect, the proposed bill would create a Philippine Ombudsman

on Trade, Commerce and Industry, with visitorial, investigative and coercive powers[86] similar to the powers granted to the Anti-trust Prosecutor under House Bill No. 26308. It is hoped that this bill, once enacted into law, will affirm and strengthen the faith of the Philippine people in a competitive, free-market economy, as it is intended and designed to catch every arrangement, agreement or course of conduct that would undermine the competitive process whereby the checks and balances of the free play of economic forces assume a significant role in preventing the control of the markets by a few persons.[87]

Taken together, all the proposals for legislation were brought to the forefront by the need to recast the present laws on monopolies and combinations in restraint of trade. The perception is that monopolies, malpractices and undue restraints on trade exist, but that there is no single mechanism with comprehensive power to investigate, ascertain and impose the proper sanctions. Collectively, the proposed bills are designed to encourage free competition, enhance productivity and reduce the cost of goods.

Chapter VII

THE SERVICES SECTOR

A. The area of services

The Philippine services sector includes banking, insurance, land transportation, shipping, civil aviation, overseas employment, construction, telecommunications and computer services.[99] This sector plays an important role in the economy. In recent years, it has been contributing about one-half of the country's real gross domestic product and generating employment for about eight million persons, which is approximatley 40 per cent of the total labour force.

1. Banking

The banking system is composed of commercial banks, thrift banks, rural banks and specialized government banks. In 1986, the banks accounted for over 87 per cent of the total resources of the financial system. Currently, an effort is underway to make Manila one of the developing financial centres for Asia. In that light, it is easier to appreciate the preference for integrated branch-banking over unit banking, and the encouragement of investment banking.

The branch-banking system ushers in a spectrum of benefits for the banking community, in particular, and the country, in general. Branches provide greater flexibility and efficiency in terms of mobility of funds, diversification of credit risks and convenience to customers who will have access to better facilities and services. Presently, there are over 2,500 bank branches in the country, a number that continues to grow. However, most of these banks are concentrated in the Metro Manila area.

The "unibanking" concept was implemented in 1980 to encourage competition among the banking institutions and to do away with specialization in the financial system. The banking system seems to have realized its goal of managing competition and despecialization when a total of

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99 See, generally, "Philippine Study on Services, 1988", Working Paper (unpublished).

10 unibanks were licensed. They now function as both commercial banks and investment houses.

A study on the economic effects of liberalization and protection in services[100] has revealed that the Philippines has been inclined to protect rather than liberalize the banking sector. Although the cost of protection may be high, the benefits that are derived therefrom contribute to the benefit of the economy, as protection prevents foreign companies from dominating the domestic market. In controlling foreign participation in the system through nationalization laws, however, the limited capacity for expansion may deter the growth of the sector. Nevertheless, protectionism eliminates the possibility of unfair competition and prevents crowding in the banking services sector. It likewise promotes self-reliance and resourcefulness among Philippine bankers and businessmen.

2. Insurance

The insurance business is undertaken by over 130 private companies and three government corporations, 13 per cent of which are foreign-owned while 87 per cent are domestic companies. Of the 113 local entities, a majority is engaged in non-life business.

Only one company has so far exported its insurance services. This dearth is due to the difficulty of obtaining licenses in foreign countries. A case in point is that of a non-life insurance company: it took almost 20 years for it to obtain a license for its branch office in Japan, then, when finally licensed to transact business, it was only allowed indirect (reinsurance) maritime business.

Protectionism is the policy of the Government in the insurance industry. Although liberalization may result in competition, lower rates and improved services, as some foreign companies may provide additional or much better services, liberalization may increase the outflow of foreign exchange as a result of declaration of dividends as well as shares of expenses. It may likewise give undue advantages favouring foreign companies which have the resources to take a large share of the market.

The cost of protectionism in the industry includes: (a) limited growth, owing to low capitalization; (b) non-availability of specialized services which foreign companies may be able to offer; (c) low level of reserves, which may deter the development of the industry; (d) limited exposure to technical know-how, which foreign firms may possess; and (e) damaging effects of claims by policy-holders against smaller companies when commercial policies are too large to underwrite.

The benefits that may result in protecting this area of services are the following: (a) the market is preserved in favour of domestic companies; (b) foreign exchange outflows are reduced; (c) protection eliminates unfair competition which may result when too many companies service a relatively small market; and (d) the growth of domestic companies is enhanced, especially if they could share the benefits of a joint venture.

3. Land transportation

The land transportation system consists of railways and motorized vehicles which are used to carry passengers and freight. Railway services are monopolized by government-owned corporations, such as the Philippine National Railways plying between Manila and the Bicol region and the Metrorail, which operates the light rail transit system in metropolitan Manila.

As regards other vehicles, competition is the name of the game. The 1986 figures show that 9,086 vehicles were cars for hire; 62,491 were jeepneys; 6,054 were trucks for hire, 11,586 were public utility buses, 129,873 were tricycles, and 781 were trailers.

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[100] "Study on the Economic Effects of Liberalization and Protection in Services", Working Paper (unpublished).

4. Water transportation

Considering its geography, water transport is essential to the Philippines which has over 7,100 islands. Water transportation is a logical means of moving goods and people from one area to another. The shipping industry, therefore, plays a major role in the country's economy because of its contribution to employment and the balance of payments. The industry, however, is beset with problems that hinder its development. Among these are: a dwindling cargo market; a tight credit situation and high financing costs; the multiplicity of government agencies regulating and controlling the shipping industry; high capitalization requirements; an absence of well-developed ancillary industries, which results in a high import content of local construction; a lack of qualified skills aggravated by high labour turn-over; high cost of available technology; competition posed by foreign shipyards; and, protectionist policies of other Governments which make it difficult to compete with their vessels.[101]

In order to develop a healthier climate for shipping, the Maritime Industry Authority has proposed legislation to be known as the Omnibus Overseas Shipping Act. The draft law seeks to provide substantial support for the industry and to liberalize some restrictions under the present regulations. It features, among others, joint ventures with an investment equity requirement of 51 per cent Filipino and 49 per cent foreign; income tax exemption; ship mortgage law liberalization; prohibition of dual registration; non-registration of vessels over 20 years of age; and, manning of vessels by Filipino crews.[102]

5. Civil aviation

The civil aviation industry covers all aspects of air transportation including air carriers, airports, airways, general sales agents, and air freight forwarders. International flights are serviced by the Philippine Air Lines, a government-owned corporation, in competition with more than 25 other airlines from different parts of the world. Domestic flight services, however, are monopolized by the same airline, being the only one authorized by the Government to operate as such. Over 30 small aircraft operators are authorized to engage only in charter, commuter and non-scheduled services. The air transport industry is serviced by 87 airports and 141 private airports. They include international airports, truckline airports, secondary airports and feeder airports.

In order to improve further the civil aeronautics services, Letter of Instruction No.417 was issued directing the Civil Aeronautics Board to liberalize the entry into the country of foreign airlines, thus allowing and promoting competition and at the same time enhancing transit flow, international trade, foreign investments and international goodwill.

Aviation policy as presently implemented, calls for the establishment of international services through formal bilateral air transport agreements which would ensure a more stable basis for the operation of air services. The policy enjoins the Civil Aeronautics Board to take into consideration and to ensure, among other concerns, equality of opportunity for the designated carriers of both countries in order to foster balanced economic benefits and values.

Foreign investments in the sector are also encouraged. Priority, however, is given to the development of repair capability and acquisition of maintenance technology, including reliable services such as taxi operation.

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101 Philippine Study on Services, pp.27-28, 1988 (unpublished).

102 *Supra, p.32.*

6. Overseas employment

Although it is the desire of the Government to develop and expand overseas employment of Philippine nationals, because of the foreign exchange earnings thus contributed to the economy, protectionism is the tendency. This is owing, mainly, to the support which the Government has promised to extend to local enterpreneurs resulting in limited foreign exchange outflow in view of the absence of foreign competitors which could repatriate earnings. Protection is regarded as being responsible for eliminating cut-throat competition which would result if there were too many companies.

The manpower service outflow of the Philippines has shifted from immigration to contractual schemes. This has proved to be an important source of foreign exchange. The approach is credited with providing employment opportunities to millions of people and has helped in part to solve the unemployment problem in the country. In addition, foreign exchange remittances from overseas workers have been viewed as an important source of the country's annual external earnings, easing imbalances in the trade accounts. The Government thus continues to stress intensification of overseas job placements to ease pressure on the domestic market.

Policy reforms are being carried out to improve the climate for overseas employment. For one, the Philippine Overseas Employment Administration is now more institutionally fit to effect a comprehensive and cohesive overseas employment programme. Policy changes in the offing are seen as positive for the growth of overseas employment. These include: deregulation of systems and procedures for faster mobilization; stress on private industry and accountability; institution of a quicker reaction mechanism for welfare; activation of training; credit assistance; and, intensified pursuit of bilateral agreements to secure the best terms and conditions that affecting Philippine overseas workers.

7. Construction

Liberalization of the construction industry would improve technical expertise and create competition, but the cost would be increased foreign exchange outflow. Hence, protectionism has been the Government's policy to avoid excessive foreign exchange outflow. The idea is to keep, within the boundaries of the State, the foreign exchange earnings of domestic companies engaged in overseas construction. Partly because of this protective attitude of the Government, the local companies enjoy a certain advantage. The low manpower cost makes them competitive in the international market.

The domestic construction industry has regained its growth momentum after the economic doldrums of 1983. Trends since 1987 indicate positive growth, with increasing demand for housing at all levels. At present, the construction industry remains a substantial contributor to investment in the economy.

The overseas construction sector, however, has suffered a major downturn since the Gulf War in January 1991. More than 50 per cent of Philippine overseas contractors were deployed in the Middle East and their projects were deferred with the war. Re-deployment has thus become a major task of the Government in order to absorb the decline in receipts of foreign exchange remittances of Philippine contractors. Moreover, they have to contend with stiff competition from other exporting countries. Limited financial capabilities compound the problem. The opportunities arising from the financial guarantee mediation of an international finance institution are quite limited, being available to only a few contractors and largely for low-risk projects. Financial guarantees extended by local finance companies are not generally acceptable to foreign clients, or to banking and financial institutions.[103]

The task of the Philippine Overseas Construction Board is to formulate strategies and programmes, regulate participation in overseas projects, and administer incentives for overseas contracting. As a regulatory body, the Board is responsible for the registration of qualified firms for overseas work based on certain criteria. This approach is intended to ensure that only qualified

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[103] *Supra*, p.45.

firms participate in competitive ventures and that tax incentive applications of firms are processed for evaluation by the proper government office. It likewise ensures the pre-qualification of prospective constituents and the helps in evaluating the viability of overseas projects in order to protect the local contractor.

8. Telecommunications

The telecommunications industry is considered as underdeveloped. For that reason, measures are being sought to upgrade the level of services offered to the public. Despite the cost of protecting the local companies from foreign competition, liberalization cannot be implemented at the moment because of the balance-of-payments problem. Foreign exchange outflow is avoided and competition, which could be detrimental to the local operators, is avoided.

Since the sector's origin in 1867, facilities and stations have been developed gradually. At present, the communications sector consists of a significant number of both private and government entities which own and operate telecommunications facilities under the concept of free enterprise. The tendency, however, is for the companies engaged in the industry to proliferate in highly profitable urban centres while leaving other areas with inadequate facilities.

Despite its incessant growth, the industry's advancement is considered to be slow compared to its American, Japanese and European counterparts. The Department of Transportation and Communications has identified a number of measures intended to accelerate the growth of the telecommunications sector, as follows:

(a) Development and implementation of a satisfactory institutional framework, including the elimination of wasteful duplication of services;

(b) Priority investment including, in particular, long-distance networks, rationalization and penetration into new areas with improved earning potential as a basis for further expansion;

(c) Development of a countrywide telecommunications programme based on the needs of the whole economy; and

(d) Introduction of international competitive bidding (with some local preference) for the purchase of equipment and the development of more effective local manufacture.[101]

9. Computer services

A growing concern in the computer industry is that it should be liberalized so that domestic users can avail themselves of the latest technology on the international market. Such a move, it is claimed, would give end-users a wider choice of firms from which they could obtain the best price-quality combination. This would then facilitate the transfer of technology and capabilities to local firms.

The cost of liberalization, however, would be as follows: (a) domestic customers may be subjected to unscrupulous foreign firms; (b) piracy of computer technicians by foreign firms may remain unchecked, thereby further diminishing the limited specialized personnel available in the country, and (c) domestic companies may be unable to compete with large firms, resulting in their ultimate demise.

In effect, protection is now the trend. The only possible benefit is the development of a self-reliant capability to compete effectively against large foreign-based firms.

The electronic data processing industry is a growing feature of Philippine business. Industry sources indicate that the number of computer installations is growing at an average of 18 per cent

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[101] *Supra*, pp.39-40.

a year.

Computer services are offered by two kinds of companies, namely, hardware vendors and purely service-oriented companies. The former have the sale of computers and peripherals as their main line of business, but offer software development, hardware maintenance, and related services to round-out their product lines. The latter service companies concentrate on the provision of computer services. Of these services, software development, programming and data entry services have the greatest potential for trade, since the provision thereof does not require any physical presence in the client's locality. With the growing pool of Philippine computer technicians and programmers, local companies are very competitive in these fields. Even with such additional expenses as telecommunications costs, the lower salary disbursements enable local companies to provide services at 40 to 50 per cent lower cost than their foreign competitors. Local companies have thus penetrated the international market and some have even established affiliate organizations in overseas markets to further promote their services.

Chapter VIII.

EFFECTS OF RESTRICTIVE BUSINESS PRACTICES

A. The concept of restrictive business practices

According to a study conducted by the United Nations Conference on Trade and Development (UNCTAD)[105], restrictive business practices (RBPs) are those practices aimed at attaining dominant positions of market power. An enterprise that reaches such a position is similar to the monopolist or firm which stands alone in a given market. It can enjoy the full advantage of its bargaining power over its customers, with respect to the goods and services it manufactures or supplies. Such a firm can dictate or fix the prices of goods or services in order to maximize profits without being outbidded by competitors which, for all intents and purposes, could be non-existent.

There are two options open to an enterprise by which it may gain a monopoly or dominant position of market power. First, it can try to be the largest or the sole enterprise to supply the market; secondly, it can enter into an agreement with existing competitors to fix the price and/or allocate the market. The latter type of restrictive business practice is undertaken through a cartel agreement, which may be a domestic, import, export or international cartel.

In all these forms of cartels, there is the possibility of collusive tendering, that is, the members of the cartel take part in a tender and submit what are called "cover bids" in order to ensure that the cartel member whose turn it is to get the contract effectively submits the most attractive bid and is then awarded the contract. Of course, even the winning bidder will have offered an exaggerated cartel price for the product or service in question. It should be borne in mind that simply because a firm is the largest or only supplier in a given market, this does not necessarily imply that the firm is engaged in restrictive business practices.

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[105] See "Restrictive Business Information", Issue No.13, United Nations Conference on Trade and Development (TD/B/RBP/INF.19) 11 November 1987, p.2.

B. Classification of restrictive business practices

Usually, RBPs are regarded as vertical, horizontal or conglomerate. This classification would follow from the terminolgy prevailing in the literature[106] on industrial organization. Vertical practices involve enterprises engaged in different phases of a production process, such as a plantation-oriented transnational. A vertical RBP would aim at obliging suppliers of goods to sell them at unfairly low prices then force consumers or distributors to pay excessive prices. Horizontal RBPs would be relevant where restrictive practices affect similar product groups. Merger activity affecting such firms would fall into this category if it was intended to restrict competition. The conglomerate type of RBP would involve firms in distinct product lines.

It would not be possible to identify all the numerous schemes employed by firms engaged in altered or modified forms of RBPs having the same result or effect. However, the main types of vertical practices have been identified in a document issued by the United Nations Conference on Trade and Development (TD/B/RBP/INF.19 of 11 November 1987). The criteria enumerated are: (a) refusal to deal; (b) exclusive dealing; (c) reciprocal exclusivity; (d) resale price maintenance; (e) tied selling; (f) differential pricing; (g) predatory pricing; (h) transfer pricing; and (i) concentration of market power through mergers, take-overs or joint ventures.

C. Effects of restrictive business practices

1. In general

Restrictive business practices have the effect, among others, of overpricing, owing to the desire of the companies in dominant market positions to maximize their profits. RBPs likewise inhibit or bar competition, stall the production of high-quality goods and merchandise, and deter technology transfer. They may likewise lead to the cornering of markets. It is in this regard that anti-trust legislation comes into play, so as to protect trade and commerce, against unlawful restraints and monopolies. This is done in order to promote efficiency by effectively assuring healthy competition, with a view to increased output, faster economic growth, and lower prices for basic goods and services, which are the main goals of a sound economic policy and development.[107]

2. The situation in the Philippines

(a) Pharmaceuticals

A report in *Business Asia*[108] found overpricing in the field of pharmaceuticals to be significant. The article argued that transfer pricing in this sector was primarily responsible for the transnational companies earning as much as 1000 per cent on the price of finished drugs sold in the country. Moreover, one author has pointed out that there is widespread use of restrictive business practices by the pharmaceutical industries in the domestic market.[109] The claim was made as follows:

"In the 1950s, the Philippine Government imposed controls concerning the importation of foreign

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[106] See Frank Long, "Restrictive Business Practices, Transnational Corporations and Development - A Survey", p.76, 1981, Queen Elizabeth House, Oxford.

[107] See Act No.3247, as amended (1925).

[108] *Business Asia*, 28 January 1977, p.27, cited in Frank Long, *supra*., p.98.

[109] Frank Long, *supra*, pp.92-93.

drugs. A number of transnationals x x x, began local production to maintain their overseas market share. By 1970, only two Philippine companies ranked among the leading pharmaceutical manufacturers in the country. In terms of sales volume, transnationals had captured 70 per cent of the local market x x x Industry is, therefore, dominated by foreign companies and their subsidiaries. The bulk of pharmaceutical inputs are derived from foreign inputs supplied by the parent companies. In other words, local raw materials that had previously been featured as parts of the indigeneous industry are hardly used. Restrictive business practices used by transnationals to dominate the local market have included tied purchases of raw materials, export restrictions, and transfer pricing strategies. Advertising and sales promotion have also played a role in diverting demand away from traditional drugs. Prices have often been found to be twenty times higher than the prices of similar drugs of some European markets. A study on the restrictions of exports in foreign collaboration agreements in the Philippines and India ... [has found] a wide range of restrictive business practices affecting principal manufacturing activities such as in the manufacture of food, beverages, textiles, electrical supplies, chemicals, metals, petroleum, tobacco products and office equipment. In the case of the Philippines, the restriction on export products covered by licensing agreements was highest and covered 65 per cent of the total number of agreements with restrictive clauses. For example, export restrictions were 82 out of 126 restrictive agreements. Of these, 49 involved a total ban on exports and 67 were tied purchases."

(b) Cars

The *Far Eastern Economic Review*, on 20 April 1989, reported that while the Philippine car industry had moved into high gear, with the Board of Investment's car development programme designed to conserve foreign exchange, generate employment and spur industrialization, by designating three companies to assemble cars locally, to the exclusion of others, the Board's action had resulted in a cartel. The *Review* reported that one member of the legislative body claimed that the programme was a cartel, that is, there was no competition in terms of prices and quality. The programme was viewed as restricting the entry of new and, possibly, more efficient firms into the industry, which could in turn generate more employment opportunities, encourage competition and, perhaps, lower the prices of cars which had soared to a high level.

(c) Services

The protectionist attitude of the Government towards services may be likened to restrictive business practices in that it inhibits the entry of foreign firms into the commercial arena. Liberalization would definitely improve local efficiency because of the competition that would be introduced with the entry of highly specialized and trained entities. It might likewise result in the production of high-quality goods or services. Liberalization may, however, also lead to the loss of domestic companies unable to compete effectively with foreign companies owing to a lack of capital or of specialized expertise. While nationalization laws may bring about the effective control by Philippine nationals of the various areas of services, they may, nonetheless, impede the growth of the industry. The policy-makers must, therefore, make a choice.

(d) The private sector

A monopoly in the private sector could result in increased of prices of goods or services which the enterprise manufactures or offers to the public. This can come about because, being alone in the market, a company can dictate the price and maximize its profits. Duopoly and oligopoly are much better in encouraging competition. Despite the possibility of a cartel, either duopoly or oligopoly would be more acceptable than monopoly. In all three cases, however, because of the dominant market positions which they enjoy, the result could be higher prices and possibly lower quality of goods produced or services offered. Deterrent as they are to competition, the possibility of technology transfer or development likewise becomes a hard task to perform.

(e) The public sector

In the public sector, where government-owned and/or controlled corporations exist, monopoly may arise. This could be brought about by the reluctance of the private sector to undertake the risk of establishing such firms as water services, domestic air transportation, and electric power services. Monopolies have resulted, to a certain degree, in a drain on the Treasury. On the one hand, the Government is forced to venture into certain sectors to provide the public with the services necessary. On the other hand, the resultant effect is that the Government can raise or impose additional taxes to cover the costs of the goods or services needed by the people.

Chapter IX.

CONCLUSION

The Philippines has had experience gained over at least five decades in the formulation of policies and the adoption of legislation on competition and practices that restrict or restrain the conduct of business. The areas of rule-making cover a wide range, including patents, trademarks, tradenames, unfair competition, monopolies and related matters. Be that as it may, the number of proposals pending consideration by the legislative body indicates a desire to change or improve the rules presently in force. The direction which the changes or innovations will take ultimately depends upon the philosophy and ideologies affecting the thinking of the country's policy-makers.